No. 93-1556

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1993

APHRODITE E. KARATINOS and NICHOLAS E. KARATINOS,

Petitioners,

-v-

TOWN OF JUNO BEACH, FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of the State of Florida Fourth District

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In general the Respondent accepts the Petitioners' statement of the case and facts but adds the following to dispute, clarify or supplement Petitioners' statement. The Petitioners will be referred to as Petitioners or Karatinos, and the Respondent will be referred to as Respondent or Town. The Florida Department of Natural Resources and its Beaches and Shores Division will be referred to as DNR. Appendix references herein (App. ___) are to the Appendix contained in the Petition for Writ of Certiorari.

In regard to the first paragraph of Petitioners' statement, it should be noted that the Petitioners' settlement with DNR was reached just prior to the case going to trial. DNR purchased the property from Petitioners in full settlement of the Petitioners' inverse condemnation claim for a total permanent regulatory taking, and DNR was then dismissed from the case.

Petitioners, at page 4 of their Brief, make reference to the Town allowing multi-family structures to be built on similar beach front property south of the Petitioners' property. It should be noted that the structure referred to by Petitioners was a reconstruction on the footprint of a motel that was in existence in 1958 when Petitioners acquired their property. The reconstruction took place in 1974, 5 years prior to the adoption by DNR of the Coastal Construction Control Line (CCCL) in 1979 and the Town's adoption of its Zoning Ordinance Section 5.120 in 1979. Petitioners further state on page 4 that DNR possesses the exclusive right to issue permits on ocean front property in the State of Florida, but this is incorrect inasmuch as the Town has concurrent jurisdiction over such ocean front property located within the Town boundaries.

Petitioners' reference at page 5 regarding the conflict between the Town's Zoning Ordinance Section 5.120(c)

(requirement of prior DNR approval) and the DNR Administrative Rule 16B-33.08(1)(c) (processing requirement for prior local zoning approval or waiver) deserves clarification. Section 161.053(4)(b) Florida Statutes (1979) does not contain a procedural processing requirement for prior local zoning approval or waiver. The Town adopted its Section 5.120 Zoning Ordinance on August 8, 1979. DNR did not adopt its administrative rule requiring local zoning approval or waiver prior to DNR processing a permit application until November 18, 1980, some 15 months after the Town's ordinance. There was no evidence that either the Petitioners or the Town were aware of the DNR rule before Petitioners made application to DNR in 1982, which was after the Town had rejected their first site plan.

Respondent disputes Petitioners' statement at the bottom of page 5 regarding their compliance with all of Juno's demands during the application process and that the submittals they made were at Juno's request. The fact is the Town has a general site plan approval process when land owners seek to construct on their property. It simply requires the land owners to submit a site plan for approval which must meet all of the then existing zoning requirements. The plan is reviewed by the Planning and Zoning Commission and the Town planner to determine if it complies with all zoning requirements. If it does, it is recommended for approval. If it does not, the owner can make changes to comply or the plan will be rejected. If the owner cannot comply, they can then seek a variance, modification or zoning change.

Petitioners' site plan submitted in November 1981 complied in all respects with the zoning requirements except that it violated the Town's 50 ft. set-back from the CCCL. (It also violated the CCCL.) In fact, Petitioners submitted several site plans with multi-family units ranging from two units to ten units, all of which violated the CCCL. Petitioners only requested approval of the two unit plan. The Planning and Zoning Commission recommended

denial because the plan failed to comply with this zoning set-back requirement. The Town Council at its regular Town Council meeting (not a public hearing) accepted the Planning and Zoning Commission's recommendation and denied the site plan approval. Petitioners did not file a petition for modification under Section 5.120(c) or a petition for variance, nor did Petitioners appeal the Town's site plan denial. This issue was resolved at trial by the trial court holding that the site plan was rejected because it was not in accord with the set-back requirements and the Karatinos had not obtained a variance or modification. App. B, 11.

The so called "Catch 22" was the resulting conflict between the processing requirements of the Town and DNR after DNR adopted its Rule. Since these were processing requirements and not substantive law, either DNR or the Town could modify or waive their requirement. This is ultimately what occurred when the Karatinos refiled for site plan approval with the Town in 1985 *and* submitted the petition for a modification pursuant to Section 5.120(c). The Town waived the requirement for prior approval by DNR. A public hearing as required by Section 5.120(c) was conducted on July 10, 1985. Petitioners new site plan requested 6 units instead of 2 units, and all 6 units were still in full violation of both the Town's 50 ft. set-back line and the CCCL. After hearing the Petitioners case, the Town Council at its regular board meeting of August 14, 1985, albeit contrary to the Council members' belief that no building should be constructed on the property, granted a modification to the set-back that would prohibit any buildings, and granted Petitioners the right to construct two dwelling units.

Petitioners' statement at the top of page 7 regarding the "waiver" sought from zoning commissioner, Don Durnell, needs clarification. As noted elsewhere in Petitioners' brief, the Town Council is the Town's legislative body. Mr Durnell had no authority of his own to waive the zoning ordinance requirement and issue a no objection letter. Although Petitioners inquired of this

to Mr. Durnell, Petitioners never submitted a request to the Town Council for waiver nor did they ever appear before the Town Council to seek a waiver until 1985, as noted previously. Mr. Durnell's letter of November 15, 1992 (App. D, 17) stating that the Town Council's denial of the Karatinos site plan on January 13, 1982 was final and not subject to appeal was a correct statement at that time. Since any appeal or review would have to have been taken within thirty (30) days of the Town's action, and no appeal or review action was initiated by Petitioners, at the time of the letter on November 15, 1982 the site plan rejection was final and not subject to appeal. The latter did not mean the Town had made a final decision regarding how Petitioners could use their land, since modification had not been requested. It is clear from the trial record that there were misunderstandings on the part of Petitioners' architect as to the manner to proceed.

The "special exception/variance" application referred to by Petitioners at page 8 was simply the "form" used by the Town to initiate the petition for modification under Section 5.120 (c) which began the process of the town publishing notice and conducting a public hearing. There was ample evidence and law presented by the Town to the trial court to establish that a "modification" and a "variance" were similar processes, both of which are used to obtain a deviation from zoning restrictions when special circumstances justified. The trial court found that although there was some dispute as to whether this process was a variance or a modification, that under the facts of this case it was unessential to the court's decision. App. B, 11.

With regard to the conflict between the Town's comprehensive plan and its zoning map, there is ample testimony in the trial record, and the trial court found, that this had nothing to do with the inability of the Karatinos to develop their land, and in fact, as soon as the error was brought to the Town's attention the Town took adequately prompt steps to correct the inconsistency. App. B, 10.

At page 9 Petitioners make reference to an increase in the cost of constructing the two units in accordance with DNR requirements. It should be noted that the requirements illuded to by Petitioners were DNR structural engineering requirements for a piling system and other structural features, costs which were dictated by the character of the Karatinos land being ocean front property and subject to severe ocean forces. These were not requirements of the Town.

In addition to other findings of the trial court mentioned throughout this statement, the trial court also found:

> 1. That every single plan that Petitioners submitted to the Town required constructing the entire foundation of the building on the ocean side of the DNR Coastal Construction Control Line. [App. B, 10].
>
> 2. The Town's actions regarding the 20 ft. swath of land controlled by the Town's ordinance landward of the Coastal Construction Control Line had no effect on the DNR's decision denying Petitioners' permission to build on the land. [App. B, 10].
>
> 3. The DNR found that construction on the lot would destroy the vegetation, degrade the dune, endanger adjacent properties, and in a severe storm, knock out an evacuation route, and under the circumstances DNR made it clear that there was no contingency under which they would permit construction of a building on this sand dune. [App. B, 12].
>
> 4. Under the Declaratory Judgment action the

> Court declared that the Town's ordinance, Section 5.120(b) creating the set-back, was not an improper or unlawful exercise of the Town's police power and did not in effect appropriate the Petitioners' property, and that there is a variance or modification procedure, and when the ordinance is viewed in light of its purpose and impact it is not an invalid exercise of police power. [App. B, 13].

Although Petitioners make reference on page 10 to the affidavit of Alfred Devereaux stating the possibility of DNR approving a structure cantilevered over the CCCL, the affidavit is without relevance or materiality in this matter. DNR has no jurisdiction landward of the CCCL. Thus, if a structure could be built landward of the CCCL, it would not require approval by DNR, and as the trial court found, the 20 ft. swath landward of the CCCL was of no benefit to the Petitioners' desire to construct.

SUMMARY OF ARGUMENT

This case was decided primarily by the trial court resolving disputed issues of fact and finding that Petitioners were prevented from building by the CCCL, as a matter of fact, and not by the Town's actions. Since neither the trial court nor the Florida appellate courts established any rule of law, nor based their holding on any unique legal ruling, no conflict with any other decisions has been demonstrated by the Petitioners. The facts of this case are unique to this case and not likely of frequent reoccurrence, thus this case has very little precedent value. The Petitioners were compensated for the total loss of their land in their settlement with DNR.

REASONS FOR DENYING THE WRIT

There are a number of reasons why this case is not one which requires the exercise of the Court's extraordinary and discretionary jurisdiction.

1. The state appeals court upheld the trial court's findings of fact. The case below is based primarily upon the trial court's resolution of strongly contested evidence embodying numerous direct and collateral issues. App. B, 7. It is apparent from Petitioners' Brief that there is still disagreement on their part about the evidence and the trial court's findings.

The key fact in this case was the existence of the State of Florida Coastal Construction Control Line (CCCL) that bisected the Petitioner's property leaving approximately 10% landward of the CCCL. Without a permit from DNR, Petitioners could not build on their property, and Petitioners were never able to obtain a permit.

Petitioners' complaint against the Town is that the Town delayed the Petitioners in their ability to apply to DNR for a permit that was ultimately denied. The primary weakness in that claim is that Petitioners did not avail themselves of a modification provision until 1985, a provision that gave flexibility to the Town's dune set-back. Petitioners remaining claims of: "Catch-22" conflicts, no waiver by the zoning commissioner, when the denial by the Town Council was final, conflict between the Town's comprehensive land use plan and the Town's zoning map, and approval of only two units in 1985 are simply collateral issues. The trial evidence showed that some delays were due to glitches in the Town's ordinances and some delays were due to misunderstandings, misinterpretations, or decisional delays of the Petitioners. All of these delays were properly categorized by Judge Anstead's special concurring opinion, in the Florida appellate

court's denial of re-hearing, where he stated that he would place these delays more in the category of the "normal delays" created by the myriad of governmental procedures mentioned by the Supreme Court in *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 321, 107 S. Ct. 2378, 2389, 96 L. Ed. 2d 250 (1987), as not giving rise to a temporary taking for entitlement to compensation. App. A, 5.

The purpose and effect of the Town's zoning code Section 5.120 was not to deprive Petitioners the use of their property. The trial court found from extensive evidence that the dune is an important barrier in the event of a large hurricane or a 100 year storm event. The dune is held in place by native vegetation, and the vegetation is essential to preserve the integrity of the dune. App. D, 8. The DNR found (and the trial court accepted) that construction on the lot would destroy the vegetation, degrade the dune, endanger adjacent properties, and in a severe storm, knock out an evacuation route. *Id.* at 12. Although the Petitioners raised an isssue that the Town had some designs on acquiring the Petitioners' lot, the court found to the contrary. *Id.* at 12.

Petitioners raise an issue in their brief that the time of "taking" is a key issue, and they cite cases in support of this argument. Petitioner's Brief, at 14-17. This argument regarding *when* the "taking" occurred by DNR is misplaced. Petitioners interpret the trial court's finding that Petitioners' project was "doomed" because of the state's CCCL as a finding by the court that the DNR administrative process denied the Karatinos permit to construct "*ab initio*." Petitioners misinterpret both the trial court and the Florida appellate court on this point.

The finding that the Petitioners' project "was doomed, regardless of the Town's action" was a finding as a *matter of fact,* not a determination of a legal "taking." It is an undisputed fact that Petitioners were required to get a permit from DNR before they

could build. It is also an undisputed fact that Petitioners were denied a permit by DNR, and the court found from the evidence and testimony in the case that based on the factual characteristics of the Petitioners' property the Petitioners would not have received a permit whether in 1982, 1985, or 1991. Regardless of when the DNR "taking" legally occurred, the fact of the matter is the Petitioners could not build on the land in 1982 even if the Town had approved their site plan. Or stated conversely, even if the Town had wrongfully denied Petitioners' right to construct in 1982, Petitioners would have no basis to determine damages against the Town because they could not establish an ability to build on the property. Accordingly, the Florida appellate court properly held that the Town's actions were irrelevant because the Town was not the cause of the Karatinos' damages. App. A, 3.

However, the Town denied the Petitioners' claim that the Town acted improperly and the trial record and Final Judgment established this. In order for there to have been a temporary taking by the Town, there would have to be a "taking" when the Town denied the Petitioners' site plan January 13, 1982. Following the abundance of takings jurisprudence, much of which is cited by the Petitioners in their brief, no taking occurred based on the rationale expressed in this Court's ripeness policy. The Petitioners could have pursued a modification (variance) which they did not do until 1985. The ripeness doctrine is clearly established by this Court's previous decisions in *Williamson Co. Planning Comm'n. v. Hamilton Bank,* 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985); *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986); *Penn Central Transportation Co. v. New York City,* 488 U.S. 104, 98 S.Ct. 2646, 57 L. Ed. 2d 631 (1978). The landowner must obtain a final decision regarding the application of zoning regulations to their property. The final decision requirement includes a requirement that the property owner seek variances from the applicable regulations. *Williamson County,* 105 S. Ct. at 3117. In 1982

Petitioners had not given the Town the opportunity to consider a modification, that is, relief from the Town's set-back requirement. The fact that the Town granted such a modification when presented with the petition in 1985 gives credence to the Town's modification provision and this Court's ripeness policy.

The so-called glitch or "catch 22" was discovered by Petitioners after the January 13, 1982 site plan denial. Petitioners sought waiver of the DNR processing precondition which DNR refused to grant. Later, Petitioners returned to the Town and reapplied in 1985 for site plan approval with a plan containing six (6) units, which plans now contained detailed engineering plans and specifications for a piling system and structural design to withstand the oceanic forces. At this time Petitioners also submitted a petition for modification of Zoning Ordinance Section 5.120(b). It should be noted that although Petitioners were given a form entitled "special exception/variance", it was merely the form used by the Town to initiate the modification process. As previously noted in the statement of facts at page 2, *supra,* the DNR processing precondition was adopted some 15 months after the Town's ordinance, unbeknownst to the Town.

Despite the Town granting Petitioners the right to build two (2) units, Petitioners' plans were doomed whether in 1982 or in 1985. Petitioners could not build until DNR also issued a permit, which DNR refused to do in 1987. The testimony of Ralph Clark, the DNR chief coastal engineer, who was also on the staff in 1982, established that given the characteristics of the Karatinos' property and the DNR criteria and standards, DNR would not have permitted the project in 1982 for the same reasons it denied the project in 1987. This testimony was unrebutted. Since Petitioners could use their property for the same uses in 1982 (*i.e.*, beach front without structures) as they could in 1985, 1987 or 1991 because of the CCCL, the Town's actions could not have caused damage to the Petitioners.

2. Although Petitioners' "Questions Presented No. 2" raises a question of "conflict in decisions of the lower courts", Petitioners fail to demonstrate any specific conflict between the holding of the Florida District Court of Appeal deciding a federal question in this case and any United States Court of Appeals' decisions.

Petitioners' question asks "Whether the Court should resolve the conflict in decisions of the lower courts and respond to their stated uncertainty as to when a regulation goes too far in a takings case and causes economic injuries which are disproportionately concentrated on the property owners?" Petitioners' question does not state, nor does their argument demonstrate, a specific conflict between the decision of the Florida Fourth District Court of Appeal deciding a federal question in this case and any United States Court of Appeals' decision. Rules of the Supreme Court, Rule 10, sets out the character of reasons (although not exclusive) that will be considered by this Court in exercising discretitionary jurisdiction. Subsection (b) thereof lists a conflict between the decision of the state court of last resort deciding a federal question and decisions of another state court of last resort or a United States Court of Appeals.

The Respondent is unable to discern any such conflict demonstrated by Petitioners' Brief. Although Petitioners attempt to demonstrate what they perceive to be conflict between some of the United States Courts of Appeals, they have not identified with any clarity a single holding or issue that is in conflict with the holding of the Florida District Court of Appeal. The state court decision was an affirmance of a factual finding, and the court set forth no rule of law, nor did it cite a rule of law as the basis for its holding. Petitioners have not cited any appellate decision of any Florida appellate court, nor of any United States Court of Appeals, which contains a comparable fact situation or ruling that would conflict with the holding in this case, that the Petitioners' project was doomed, regardless of the Town's actions.

As previously noted, regardless of when the legal taking occurred by DNR, as a factual matter Petitioners could not use the property without the DNR permit. Thus, Petitioners' case citations regarding the issue of when a "taking occurs" are irrelevant. There is no conflict between this case and the decisions in *Vatalaro v. Department of Environmental Regulation,* 601 So. 2d 1223 (Fla. 5th DCA 1992); *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) and *First English, supra.*

Petitioners' discussion on pages 23 and 25 of their brief appears to be an attempt to demonstrate conflict between several of the United States Courts of Appeal, but no issue is demonstrated that is in conflict with the Florida Fourth District Court of Appeal decision in this case. In fact, it is not demonstrated by Petitioners that there is conflict between any of the United States Court of Appeals cases cited. For example, Petitioners at page 23 cite *Southview Associates Ltd. v. Bongartz,* 980 F.2d 84, 105 (2d Cir. 1992) for the proposition that there is confusion because regulatory takings cases are decided largely upon the particular circumstances in each case on an ad hoc, factual basis. But the Second Circuit Court also stated that "even though this inquiry may be 'ad hoc', the cases provide some additional guidance." *Id.* at 106. Furthermore, this Court recognized in *Penn Central, supra,* that it is unable to arrive at a set formula to determine where land use regulation ends and begins, but rather prefers to engage in essentially ad hoc, factual inquiries. *Accord, Lucas, supra* at 2893.

Petitioners also cite *Reahard v. Lee County,* 968 F.2d 1131, 1135 (11th Cir. 1992), *cert. denied,* 61 USLW 1365 for that court's statement that "admittedly, there has been much confusion as to when regulation goes too far in a partial takings case." This citation neither identifies any conflict of decisions between appellate courts, nor does it reflect that the Eleventh Circuit Court of Appeals found conflict between decisions of other appellate courts, nor that the court was unable to resolve the pending issues.

Rather, the court there also recognized this Court's language from *Penn Central, supra,* cited above, and then continues by saying "the ad hoc inquiry requires no more than an application of the law to the particular facts." *Reahard, supra,* at 1135. The numerous cases cited by Petitioners on pages 23 through 25 of their brief are all distinguishable on their facts from the present case, and rather than raising conflict, reflect each court's logical application of the law to the peculiar facts.

3. Petitioners have not demonstrated that the Florida District Court of Appeal has decided an important question of federal law which has not been, but should be, settled by this Court, or that the Florida District Court of Appeal has decided a federal question in a way that conflicts with applicable decisions of this Court. Respondent has already demonstrated that the Florida District Court of Appeal ruling was based upon af firming a factual finding which demonstrated that the Town's action did not as a matter of either logic or law result in damage to the Petitioners. Accordingly, it cannot be said that the Florida courts decided an important question of federal law which should be settled by this Court, nor that the Florida courts decided a federal question in a way that conflicts with applicable decisions of this Court. Petitioners have not cited a decision of this Court with a factual situation even slightly comparable to the present case. The facts of the instant case are unique and of no general precedent value.

4. The decisions of the Florida District Court of Appeal as well as the trial court are accurate, correct and followed precedents of this Court, the federal courts of appeals and the Florida courts of appeal. As the facts demonstrate Petitioners were compensated for the total loss of their property by settlement with the State of Florida, Department of Natural Resources. Petitioners were granted a use by the Town in 1985, but the DNR regulation permanently deprived Petitioners of all economical viable use of the land, and so in settlement, the state bought the land. The

discrepancy between the Town's modification process and the DNR application process resulted at most in a minimal delay. (Petitioners could have refiled for their site plan review and petitioned for a modification in 1983 after being rebuffed by DNR.) As the Florida District Court of Appeal Judge Anstead so aptly put it, "[O]bviously, not every delay in the development process attributable to the government results in a 'temporary taking.' " App. A, 6.

5. Review of this case by this Court is unlikely to produce any valuable guidance to property owners, government or the lower courts in takings cases. The facts in this case are unique. Furthermore, Petitioners have not focused on a clear issue for this Court to address. Despite the wealth of regulatory takings decisions (many of which Petitioners cite), Petitioners assert there is vague guidance as to when a regulation goes too far. Petitioners' request is more in the nature of legal advice, certainly not an issue that merits this Court's review.

CONCLUSION

The Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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